

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

74-81 ORIGINAL

To be argued by
IRVING ANOLIK

In the

1724

B
P/S

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

CAMILLO RIZZUTO,

Defendant-Appellant,

and

ANTHONY CASTIGLIONE, VITO ADAMO, GUIDO
ORSINI and SANTO MENDOLIA,

Defendants.

*Appeal from the United States District Court for the
Southern District of New York.*

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

IRVING ANOLIK

Attorney for Defendant-Appellant

225 Broadway

New York, New York 10007

(212) 732-3050

(7292)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J.
(201) 257-6850

New York, N. Y.
(212) 565-6377

Philadelphia, Pa.
(215) 563-5587

Washington, D. C.
(202) 783-7288

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Brief	Page
Statement	1
Introductory	2
Factual Background	3
The Government's Case	4
The Defense	8
 Argument:	
Point I. There was insufficient evidence as a matter of law to have warranted a conviction. There was no evidence whatsoever that Rizzuto was aware that any of the co-defendants were involved with drugs or with money to pay for drugs. He was arrested and convicted on sheer speculation. . . .	10
Conclusion	12

TABLE OF CITATIONS

Cases Cited:

Baumboy v. United States, 9 Cir. 24 F.2d 512	12
Poldo v. United States, 9 Cir., 55F. 2d 866, 869	12

Contents

	Page
United States v. Alsondo, 486 F.2d 1339 (2d Cir. 1973) cert. granted	11
United States v. Andolschek, 142 F.2d 503, 507	12
United States v. Casalnuovo, 350 F.2d 62 (2 Cir., 1971)	11
United States v. Euphemia, 261 F.2d 441 . .	11
United States v. Falcone, 109 F.2d 579, 581 (2 Cir. 1940)	12
United States v. Hysohion, 448 F.2d 343 (2 Cir., 1971)	11
United States v. Peoni, 100 F.2d 401, 403 (2 Cir. 1938)	12
United States v. Vilhotti, 452 F.2d 1186 (2 Cir., 1971)	10
<u>Statutes Cited:</u>	
21 U.S.C. 846, 841 (a)(1)	3
841(b)(1)(A)	3

APPENDIX

	Page
Docket Entries	1a
Indictment (Filed September 13, 1972)	3a
Findings of Fact and Conclusions of Law (Filed December 10, 1973)	6a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -x
Docket No. 74-8174
- - - - -x

UNITED STATES OF AMERICA,

Appellee,

-against-

CAMILLO RIZZUTO,

Defendant-Appellant,

-and-

ANTHONY CASTIGLIONE, VITO ADAMO,
GUIDO ORSINI, and SANTO MENDOLIA,

Defendants.

- - - - -x
DEFENDANT-APPELLANT RIZZUTO'S
BRIEF

STATEMENT

Defendant-appellant CAMILLO RIZZUTO appeals from judgments of the United States District Court for the Southern District of New York, rendered the 30th day of April, 1974, convicting him of conspiracy to violate the narcotics laws and one substantive count thereof, after trial before Brieant, D.J., without a jury. The

Court sentenced appellant to 4 years imprisonment, concurrently, on both counts.

INTRODUCTORY

The single most crucial aspect of this appeal involves the utter lack of evidence against RIZZUTO connecting him with the very serious crimes of which he was convicted.

It is submitted that the Trial Judge, who tried this case without a jury, was unwarranted as a matter of law in finding guilt beyond a reasonable doubt since there was absolutely no evidence at all that RIZZUTO had any knowledge of the existence of drugs or money to buy drugs, nor that he in any way, shape, or form, participated with any of the co-conspirators in any conspiracy to possess, sell, or distribute the drugs involved herein or any others.

It is, frankly, incredible that the Court should have come to the conclusion which it did, especially in view of the decision and opinion which a close reading of reveals that the Trier of Fact himself made no determination concerning drugs as against RIZZUTO, but, rather,

engaged in surmise and speculation.

FACTUAL BACKGROUND

Since this case was tried without a jury, the Court made findings and conclusions.

The defendant-appellant RIZZUTO was indicted along with four co-defendants, whose names are set forth in the caption of this case. They were charged with two counts of violating Title 21 U.S.C. 846, 841(a)(1) and 841(b)(1)(A).

Castiglione was released on \$100,000.00 bail and, thereafter, disappeared. Defendant Adamo is now deceased. Orsini and Mendolia at the time of trial were in custody of Canadian authorities awaiting trial on a subsequent narcotic charge (F.C.1, 2)*.

As a result of the foregoing, only RIZZUTO was tried.

For the purpose of this appeal, we accept as valid the factual determinations of the Court below, but dis-

* F.C. refers to the "findings and conclusions" of Judge Brieant. Numerals without a prefix refer to the minutes of trial, unless otherwise indicated.

agree sharply with its conclusions that these facts warranted a verdict of guilty.

As we shall demonstrate hereinafter, there was absolutely no basis for any finding of guilt as against RIZZUTO.

THE GOVERNMENT'S CASE

On April 28, 1972, Special Agent John J. O'Neill and certain Customs Officers at Kennedy Airport seized an unlocked black leather suitcase bearing the brand name "Lancel" which had arrived on a TWA flight from Paris, France. The Lancel bag was further identified by a baggage tag bearing the name of John J. O'Neill.

After the suitcase was obtained, its contents were tested, using a marquis reagent, and found to contain 26 clear plastic bags showing a positive reaction for opiates (11-17, 31).

The contents were stored at the BNDD vault in New York (19-21).

A French police officer, Claude Chaminadas, who played an undercover role in this case, testified that he pretended to be the French owner of the heroin in

question in order to infiltrate the smuggling operation (38).

On April 29th and May 1st, 1972, Chaminadas spoke by telephone from the Holiday Inn in New York City to persons in Montreal, Canada, identifying themselves as Guido Orsini and Santo Mendolia. In the course of the telephone conversation, Chaminadas was given certain directions in order to meet someone in New York (41-45).

On May 2nd, 1972, Orsini and Mendolia instructed Chaminadas to move from the Holiday Inn to the Sheraton Motor Inn, and was also told to meet their "friend" at Pier 83 at 43rd Street and 12th Avenue, at 7:00 P.M. Chaminadas was told by the Canadians that the selling price for the heroin would be \$10,000.00 per kilo, or a total of \$130,000.00 (45-50).

At 7:00 P.M. on May 2, 1973, Vito Adamo met Chaminadas at Pier 83 and conversed with him concerning the delivery of the narcotics in question. Later, he was observed meeting defendant Castiglione. On that evening, Castiglione was observed driving a green car, which RIZZUTO admitted having lent to Castiglione on occasion (95, 96, 106, 141, 155, 156).

There were later meetings between Adamo and Chaminadas at 9:00 P.M. and then again at 4:15 A.M. on 3rd of May (54-58).

For the purpose of this appeal it is unnecessary to detail the numerous other encounters among Chaminadas, Adamo, and Castiglione, or the calls from Orsini and Mendolia (59-61 ; 62-66; 110).

At 11:45 A.M. on May 9th, 1972, CAMILLO RIZZUTO registered in Room 1005 of the Sheraton Motor Inn in the name of Vincenzo Colomba (82-85). He was alone at the time.

At about 12 noon that same day Chaminadas received a telephone call from Castiglione asking him to come to the latter's room because he was expecting a call from Canada. Chaminadas therefore went to Room 1525, which was Castiglione's room, and subsequently spoke on the telephone with Orsini who told Chaminadas not to worry because Castiglione would produce the money and was prepared to pay a deposit of \$20,000.00 of his own money in order to demonstrate his sincerity (66-68; 111).

At approximately 1:00 P.M., through the video system in the hotel, RIZZUTO was observed going to Castiglione's

room, carrying nothing, and leaving about 10 minutes later, again carrying nothing. RIZZUTO then returned to Room 1005 (112, 113).

At 2:05 P.M., RIZZUTO was again observed leaving his room and going to Castiglione's room (113, 114).

At about 4:00 P.M. Castiglione came to Chaminadas' room to advise him that the money was coming from Brooklyn and that it would arrive about 9:30 (68, 69).

Shortly before 9:10 P.M., Agent Pavlick observed Castiglione coming down the hall from the direction of the corridor in which RIZZUTO's room was located, carrying a small black attache case.*

At about 9:10 P.M. Castiglione entered Chaminadas' room still carrying the small leather attache case which he placed on the bed, opened, and counted out \$122,000.00 (69, 70, 123-125).

At about 9:25 P.M. Agent O'Neill observed Castiglione take the elevator to the 10th floor. Together with two other agents, they observed Castiglione exit on the 10th floor and walk down the corridor, at which

* It must be borne in mind that there are many rooms on this floor and the inference that Castiglione was coming from RIZZUTO's room is based on sheer speculation.

time he was placed under arrest and the suitcase which he was then carrying was found to contain 26 clear plastic bags filled with white powder (22-26; 85-87).

The Special Agents then went to Room 1005 where they arrested RIZZUTO. It is extremely significant to note that RIZZUTO had no narcotics and no money in his possession. He had a suitcase containing paper towels (34-37; 86; 91-92).

This was the prosecution's whole case.

THE DEFENSE

Both RIZZUTO and Mrs. Rizzuto testified. RIZZUTO explained, through an interpreter, that he was an unemployed presser. He stated that he knew Castiglione from Italy and had agreed to meet him at the Sheraton where the latter was supposed to fix him up with a girl. RIZZUTO also admitted that he owned a 1968 automobile which he had frequently lent to others, including Castiglione, but had never inquired what these people used his car for (147, 155-163).

RIZZUTO stated that he never had any business dealings with Castiglione.

Mrs. Rizzuto testified that her husband was a "good time Charlie" who always lent his car to people and that he had left his home on May 9, 1972 after Castiglione had called his home (134-143).

RIZZUTO explained that he registered under a pseudonym since he did not feel he wanted his name known in view of the fact that he was going to meet some girls. He stated that he feared detection because he was a married man (149, 150).

RIZZUTO explained that he twice visited Castiglione's room to find out why the girls were so late and declared that Castiglione never came to his room (1005). (150-153, 164)

Finally, RIZZUTO declared that he had never heard the names of Santo Mendolia or Guido Orsini (156, 157).

ARGUMENTPOINT 1

THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO HAVE WARRANTED A CONVICTION. THERE WAS NO EVIDENCE WHATSOEVER THAT RIZZUTO WAS AWARE THAT ANY OF THE CO-DEFENDANTS WERE INVOLVED WITH DRUGS OR WITH MONEY TO PAY FOR DRUGS. HE WAS ARRESTED AND CONVICTED ON SHEER SPECULATION.

A perusal of the foregoing statement of facts, we submit, reveals that RIZZUTO, who had no background whatsoever in dealing in drugs, was arrested for no reason other than the fact that he was seen going into Castiglione's room. No narcotics, nor any significant sum of money was found in RIZZUTO's room or on his person. Chaminadas did not know him. He had never been observed prior to May 9th by the authorities.

He was arrested and convicted merely because he happened to be at a particular place at a particular time, without any evidence of criminality.

It is submitted that the case at bar is very similar to UNITED STATES v. VILHOTTI, 452 F.2d 1186 (2 Cir., 1971).

It will be recalled that in the VILHOTTI case cer-

tain co-defendants had gone to a particular building where stolen merchandise was contained, but that there had been no evidence that they were aware of the existence of stolen merchandise. This Court reversed their convictions and dismissed the indictment because they were found guilty solely upon speculation. The evidence there, as herein, was insufficient as a matter of law.

See, also, UNITED STATES v. HYSOION, 448 F.2d 343 (2 Cir., 1971); UNITED STATES v. CASALINUOVO, 350 F.2d 62 (2 Cir. 1971); and, UNITED STATES v. EUPHEMIA, 261 F.2d 441.*

The defendant-appellant herein was tried alone for very serious crimes. He was never known to be involved in drugs previously nor was he ever found in possession of drugs or of money with which to buy drugs. The speculation of the officers that Castiglione intended to go to his room, or had gone from his room, is without any basis in fact. Had they not arrested Castiglione when they did, perhaps he might have gone to RIZZUTO's room and, then again, he might have gone to another room.

There was no proof of Rizzuto's awareness of the conspiracy, nor that he promoted the venture, nor that

* UNITED STATES v. ALSONDO, 486 F.2d 1339 (2d Cir. 1973), cert. granted, is not to the contrary since Rizzuto was never found with anything incriminating in his possession.

he had any stake in its outcome, UNITED STATES v. FALCONE, 109 F.2d 579, 581 (2 Cir. 1940); UNITED STATES v. ANDOLSCHEK, 142 F.2d 503, 507; UNITED STATES v. PEONI, 100 F.2d 401, 403 (2 Cir. 1938).

Even the guilty may not be convicted on suspicion alone, and herein there is no evidence of guilt.

Mere suspicion is never enough for an arrest.

The officers must have evidence sufficient to justify the charges, POLDO v. UNITED STATES, 9 Cir; 55 F.2d 866, 869; BAUMBOY v. UNITED STATES, 9 Cir. 24 F.2d 512.

The fact remains, however, that the arresting officers "jumped the gun" and, therefore, the Court had no right to speculate as to what Castiglione intended to do, especially when a person is charged with such serious crimes as herein.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

IRVING ANOLIK
Attorney for Defendant-Appellant
CAMILLO RIZZUTO

DOCKET ENTRIES

1a .3.

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

72 CRIM. 1014

D. C. Form No. 100 Rev.

JUDGE BRIEANT

TITLE OF CASE

THE UNITED STATES

vs.

ANTHONY CASTIGLIONE (Cts. 1 & 2)

CAMILLO RIZZUTO (Cts. 1 & 2)

VITO ADAMO (ct. 1)

GUIDO ORSINI (ct. 1)

SANTO MENDOLIA (ct. 1)

ATTORNEYS

For U. S.: Barbara A. Rowan, AUSA
264-6562

For Defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk	5/17/74	United States		
J.S. 3 mailed (3, 4, 5, 6, 7)	Marshal	5/17/74			
Violation	Docket fee				
Title 21					
Sec. 812, 841(a)(1), 841(b)(1)(A)					
Possess with intent to distr.					
herion (Ct. 2) 846 Conspiracy so					
to do (Ct. 1)					
2 Counts					

DATE	PROCEEDINGS
9-13-72	Filed Indictment
9-13-72	V. ADAMO } Bench warrant issued by Judge Landi, J. G. ORSINI } S. MENDOLIA }
9-25-72	C. Rizzuto - Deft. pleads not guilty. Continued. -- Tenney, J.
9-13-72	Adamo-Orsini and Mendolia - all 3 defts.
10-2-72	Rizzuto - Adjourned to 10-31-72. In 72Cr620 to be written by Judge Briant, J.
10-29-73	Closed statistically because (x) defendant - 18 () co-defendant - 2 () witness - 1 In all other cases - 1 is still pending



A

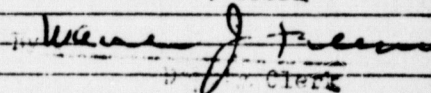
Docket Entries

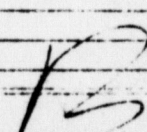
2a

DATE	PROCEEDINGS
10-29-73	C. RIZZUTO (Atty present) Jury waiver signed. Non-jury trial begun and concluded. Decision Reserved. BRIEANT, J.
12-5-73	Filed transcript of record of proceedings dated 10-29-73.
12-10-73	Filed Govt. proposed findings of fact and conclusions of law.
1-16-74	VITO ADAMO - Entered and filed Nolle Prosequi. BRIENAT, J.
3-20-74	CAMILLO RIZZUTO - Filed defts. proposed findings of fact and conclusions of law.
3-20-74	Filed Govt's. memo of law.
3-20-74	Filed Govt's. request to charge.
3-19-74	RIZZUTO - Court's decision. Deft. GUILTY as charged. P.S.I. Ordered. Sentence date set for 4-30-74. Bail cont'd. BRIEANT, J.
3-19-74	CAMILLO RIZZUTO - Filed Opinion and Findings and Conclusions # 40467; *** Deft. guilty on cts. 1 & 2. BRIEANT, J. (See opinion) (copies given to ptys. by Court Clerk)
4-30-74	CAMILLO RIZZUTO - Deft. (Atty Present) Filed Judgment and issued copies. It Is Adjudged that the deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of 4 yrs. on each of cts. 1 & 2, to run conc. with each other. Pursuant to the provisions of 21:841, deft. is placed on Special Parole for a period of 3 Yrs., to commence upon expiration of confinement. Deft. is continued on present bail until he posts bail pending appeal fixed in the amount of \$25,000. P.R.B. secyred by \$2,500. BRIEANT, J.
5-8-74	CAMILLO RIZZUTO- Filed notice of appeal from the judgment rendered on April 20-74. m/

A TRUE COPY

RAYMOND P. BURCHARDT, Clerk


 Clerk



USA-33s-538 - IND./INV. (Conspiracy to distribute and possess with
Rev. 5-27-72 intent to distribute narcotic drug.)

MA:ko
72-1720

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

ANTHONY CASTOLONE
CAMELLO RIZZUTO

Defendants

Defendant .

INDICTMENT

72 Cr. 620

The Grand Jury Charges:

1. From on or about the 1st day of April 1972
and continuously thereafter up to and including the date of
the filing of this indictment, in the Southern District of
New York,

ANTHONY CASTOLONE and CAMELLO RIZZUTO

the defendant and others to the Grand Jury unknown, unlaw-
fully, intentionally and knowingly combined, conspired, confederated
and agreed together and with each other to violate Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said
defendant unlawfully, intentionally and knowingly would distribute
and possess with intent to distribute Schedule I and II
narcotic drug controlled substances the exact amount thereof
being to the Grand Jury unknown in violation of Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

USA-33s-538 - p.2 - I /INF. (Conspiracy to distribute and possess
Ed. 5/1/71 with intent to distribute narcotic
drug)

EAR:al
72-1720

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. May 8, 1972, CASTIGLIONE possessed approximately 1 oz of heroin hydrochloride.
2. May 8, 1972, RIZZUTO rented a room at Sheraton Motor Inn under the name of Vincenzo Consuelo.
3. May 9, 1972, CASTIGLIONE rented a room at Sheraton Motor Inn.
4. May 9, 1972, CASTIGLIONE and RIZZUTO had a conversation.
5. May 9, 1972, CASTIGLIONE possessed 13 kilos of heroin hydrochloride.

(Title 21, United States Code, Section 846).

USA-33s-528A - IND/INF - Possession With Intent to Dist. Narc. Drug
Rev. 5-27-72 (Succeeding Count)

BAE:KO
72-1720

SECOND COUNT

The Grand Jury further charges:

On or about the 9th day of May, 1972
in the Southern District of New York,

ANTHONY CASTELLONE and CAMILLO RIZZUTO

the defendant , unlawfully, intentionally and knowingly
did possess with intent to distribute, a Schedule I
narcotic drug controlled substance, to wit,

approximately 13 kilos of heroin hydrochloride

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A).) (Title 18 United
States Code, Section 2)

Foreman

WILSON NORTH SEYMOUR, Jr.
United States Attorney

FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT (Filed December 10, 1973)

SOUTHERN DISTRICT OF NEW YORK

6a

- - - - -X

UNITED STATES OF AMERICA, :

- v -

72 Crim. 1014-CLB

ANTHONY CASTIGLIONE, CAMILLO RIZZUTO,
VITO ADAMO, GUIDO ORSINI and SANTO :
MENDOLIA, :

FINDINGS AND CONCLUSIONS

Defendants.

- - - - -X

Brieant, J.

In this indictment, which supersedes 72 Crim. 620, all five defendants were charged (Count 1), from about April 1, 1972 until the filing of the indictment on September 13, 1972, with conspiracy to possess and distribute narcotic drugs [heroin]; and defendants Castiglione and Rizzuto were charged (Count 2) with the possession in this District of approximately 13 kilos of heroin hydrochloride on May 9, 1972.

The original indictment, 72 Crim. 620, filed May 19, 1972, was substantially similar, but named Castiglione and Rizzuto as the sole defendants.

Findings of Fact and Conclusions of Law
Castiglione posted \$100,000.00 bail on July 6, 1972

7a

and has not been heard from since. An indictment charging criminal violation of the terms of bail (73 Crim. 677) was filed July 12, 1973.

Adamo is deceased, having perished of an acute plumbiferous condition incurred while engaged in unrelated narcotics activities. Orsini and Mendolia are in custody awaiting trial in Canada on separate subsequent narcotics charges there, and will not be available for prosecution in the United States. Accordingly, Rizzuto was tried alone before the Court, sitting without a jury, on October 29, 1973.

Through activities of the French police, it was learned by the United States Bureau of Narcotics and Dangerous Drugs [now Drug Enforcement Administration and hereafter "BNDD"] that a French courier, who was in fact an informer acting in cooperation with BNDD, would be arriving by air at John F. Kennedy International Airport ["JFK"] in New York, and that he would have checked through on his ticket as personal luggage, a black bag bearing the manufacturer's name "Lancel", which would contain 13 kilograms of heroin.

Findings of Fact and Conclusions of Law

8a

To avoid any loss of the heroin and prevent confusion, there had been attached to the bag in France a sticker on which appeared the name of John O'Neill, a Group Supervisor of BNDD, and 90 Church Street, New York City, which was his office address.

On April 28, 1972, O'Neill waited at the automated baggage discharge facility of TWA (the "Carousel") at JFK where baggage would be discharged from the flight arriving from Paris, France. He was accompanied by an agent of the U. S. Bureau of Customs.

On seeing the Lancel bag with the sticker showing his name come down through the Carousel, O'Neill picked it up, and in company with the Customs agent, walked to an area which had been set aside for Customs searches.

The bag was then opened by the Customs agent, and found to contain a number of clear plastic bags filled with the ubiquitous white crystalline powder. The bags were in separate groups, on each side of the suitcase, twelve on one side and fourteen on the other, separated by a blanket.

A Marquis reagent "field test" then administered to a

Findings of Fact and Conclusions of Law

9a

sample of the substance indicated the presence of opium, and warranted a tentative conclusion that the powder was heroin. O'Neill removed the sticker containing his name from the bag, and United States Customs made an official seizure. Following the seizure, Customs turned the bag and contents over to O'Neill, who, in the company of a Customs agent, went to the Sheraton Motor Inn at 42nd Street and 12th Avenue in Manhattan, to a room where M. Chaminadas, an undercover agent of the French police, was staying.

Present in the room with M. Chaminadas was Special Agent Gallagher, assigned to the Montreal District Office of BNDD, and Staff Sergeant Poissant of the Royal Canadian Mounted Police. After two or three hours, during which time M. Chaminadas spoke with the informant, the Lancel bag, still containing the heroin was taken to the BNDD offices where it was secured in the evidence vault. There was adequate proof of a continuous, corroborated chain of official possession of the Lancel bag and its illicit contents, from the arrival on the Carousel at JFK until May 9th, when BNDD agent placed M. Chaminadas in possession thereof at Room 1132, Sheraton Motor Inn.

Findings of Fact and Conclusions of Law

10a

On May 9th, O'Neill was present at the Sheraton. His purpose was surveillance and possible arrest of whoever might purchase the heroin in the Lancel bag from M. Chaminadas.

O'Neill personally observed Castiglione coming around the corner on the 11th floor of the Sheraton towards the elevators, carrying the Lancel bag containing the heroin. Castiglione, accompanied by three undercover surveillance officers, including O'Neill, went by elevator to the 10th floor, got off the elevator, walked to the left, and turned around. He was proceeding along the hall, away from the elevator, towards Room 1005, then occupied by Rizzuto. When Castiglione exhibited nervousness and agitation on seeing the three surveillance agents leave the elevator with him, they found it necessary to arrest him. He still had in his possession the same black Lancel bag, which still contained 13 kilograms of heroin.

Immediately after the arrest of Castiglione, O'Neill and several other surveillance officers went to Room 1005, occupied by Rizzuto. They knocked on the door, and when Rizzuto opened the door he was placed under arrest. Rizzuto's room was described as a "large hotel room". It had two double beds and

Findings of Fact and Conclusions of Law

11a

an attached bathroom. The beds were made and did not appear to have been slept in, or used. Rizzuto had a large gray suitcase, which later turned out to be full of rolls of paper kitchen towels.

The testimony of M. Chaminadas before me showed that he was Chief of the International Division of the French Police assigned at Marseilles, France. He had been stationed on undercover assignment in New York by his department for a two year period which included April and May. In France, he had infiltrated the international heroin trafficker network. While acting in his undercover capacity, Chaminadas had been instructed by defendants Orsini and Mendolia [sometimes for convenience referred to as the "two Canadian traffickers" or "the Canadians"] to proceed to another motel in Manhattan and await an appointment.

There was a sequence of telephone negotiations, furtively scheduled meetings which did not materialize and a continuous attempt by the two Canadians, operating from Montreal, to arrange for the sale and delivery of the heroin by Chaminadas to persons in New York. These active dealings continued between

Apparently consummation of the deal was prevented during that period by a failure or inability of the New York purchasers to come up with the money. For example, Chaminadas had been instructed by the Canadian traffickers on April 29th to be present for a meeting at 5:00 P.M. that day at Columbus Circle in Manhattan, standing in front of the Coliseum (Tr. p. 40). The Canadians had instructed him to carry a red jacket on his left arm. He waited there for 90 minutes, but nothing happened.

Thereafter the Canadians advised Chaminadas by telephone in a three way conversation conducted in the French language and partly in Italian, that "they will report to their people in New York, and they asked me to stay in my room for another contact" (Tr. p.44).

On the following day Orsini directed Chaminadas by telephone to be in front of the Holiday Inn at 5:00 P.M., carrying a yellow towel over his left arm. He waited there for more than an hour with no contact. Orsini and Mendolia

Findings of Fact and Conclusions of Law

13a

explained the second failure on the ground that the Holiday Inn motel was suspect, because there were too many people and too many cars around, and advised him to move. He did so, to the Sheraton Motor Inn at 12th Avenue between 42nd and 43rd Streets, previously referred to.

From the Sheraton on May 1st, he spoke again with the Canadian traffickers, who promised an appointment between April 29th and May 2nd. Chaminadas had more than twenty telephone calls to or from Orsini and/or Mendolia. All of the calls were placed by Orsini and Mendolia, and Chaminadas usually spoke with them together. During this period, Orsini and Mendolia were asserting to Chaminadas a willingness to complete the narcotics transaction, but claiming that they had difficulty in setting up an appointment because of a need to "contact the other people in New York."

At one point Chaminadas told the Canadians that he was ready to go back to France if nothing happened. They responded that "the people in New York has [sic] some difficulties to get the money to pay you." (Tr. p.48)

Findings of Fact and Conclusions of Law
Orsini had fixed the price at \$10,000.00 per kilo,

14a

and told Chaminadas that he would be paid a total of \$130,000.00. This fact shows that Orsini had independent and accurate knowledge of how much heroin was in the Lancel bag, because Chaminadas had not told Orsini how much heroin he possessed. This evidence establishes that Orsini and Mendolia had had prior direct communication with the French source of the narcotics. As set forth below, it also establishes that either the Canadians or the French source had had prior direct communications with Castiglione, for he too knew the price without the necessity of being told.

I find that a conspiracy to possess and distribute the heroin existed, and Castiglione, Adamo, the two Canadians and the French source were members thereof. Whether or not Rizzuto was a member is discussed infra.

A further appointment was arranged for Chaminadas by the Canadians in front of Pier 83, North River on May 2, 1972. Chaminadas had undertaken with the Canadians to wear a blue jacket and gray pants. He was the only person on the Pier at that hour, and was met there, shortly after his arrival, by Adamo.

Findings of Fact and Conclusions of Law

15a

A shake of the head, preceded by a nod, was the recognition signal. Adamo identified himself to Chaminadas as "a friend of your friend from Montreal." Adamo asked for an opportunity to test the heroin, and also asked for an hour or two to talk to his people first. He said he "was in Brooklyn" and this would take him two hours. Chaminadas and Adamo made a further appointment to meet in the Dolphin Bar at the Sheraton Motor Inn at 9:15 P.M. on that day.

When Chaminadas arrived at the Dolphin, Adamo was already seated at a table near the door. Adamo agreed with Chaminadas to rent a room in that hotel, and to make payment for the heroin at 1:00 o'clock the following morning; the heroin to be picked up at Chaminadas' room.

Nothing happened at 1:00 A.M., but at 4:15 A.M. on the morning of May 3rd, Adamo telephoned Chaminadas' room and asked him to join Adamo in the lobby. He there explained that "we have difficulties to get the money. We don't have enough money." Adamo asked Chaminadas to go to another hotel. He did so, and rented a room at the Americana Hotel, from which he telephoned Adamo at his room in the Sheraton. In that conversation

Findings of Fact and Conclusions of Law

16a

Chaminadas asked Adamo to meet him at the Americana. They met at Noon and once again discussed the transaction.

Chaminadas protested the delay, and suggested he would soon be in trouble with the New York police. Adamo urged him not to worry and told him that "a friend" would rent a room in the Americana Hotel and bring the money there.

At 3:00 o'clock in the afternoon, Adamo informed Chaminadas that he did not have the money, and that the money was hard to get. Chaminadas said that he was giving up and going back to France, and directed Adamo to inform the Canadians as soon as the money was ready, promising to come back to New York when Adamo had called the Canadians.

Thereafter, at 9:00 P.M., May 8th, in front of the Sheraton, Chaminadas was standing by arrangement holding a French newspaper under his left arm, when for the first time he met Castiglione, who asked him to call him "Tony" and went with him to Chaminadas' room. Chaminadas opened the Lancel suitcase in the presence of Castiglione, who tasted the heroin.

Chaminadas was instructed by Castiglione as follows:

Findings of Fact and Conclusions of Law

17a

"I must show those sample [to others] and I will be back here around 2:00 in the morning. I have a room. I have a friend here. He rent a room and he will receive the money, so as soon as you receive the money, you will tell me it and I will go to your room". Chaminadas then raised the possibility that the friend might be detected, but Castiglione responded in "the same words that Vito Adamo told [him] ... 'No, my partner will be with a woman, and they will have the appearance of a normal couple.'"

Later Chaminadas had a telephone conversation from Castiglione's room with Orsini, and Orsini told Chaminadas that he had to trust "those people, your colleague in the room that you are right now. [He] is ready to give you \$20,000.00 from his own money to keep that case with you," and remain in New York for the rest of the money.

Expressing unwillingness to stay and assume the further risk of arrest, Chaminadas agreed, and about 10 minutes after 9:00 P.M. on May 9th, Castiglione showed up at Chaminadas' room with a substantial amount of cash money in a little black bag. They counted the money five different times, reaching different

Findings of Fact and Conclusions of Law

18a

amounts, until finally it was determined that there was \$122,000.00 in the bag. Based on Castiglione's promise to pay \$8,000.00 unpaid balance to Orsini in Canada, Chaminadas agreed to deliver the narcotics and did so. The last thing Chaminadas saw, was Castiglione walking down the hotel hall away from Chaminadas' room on the 11th floor, towards the elevator, carrying the black leather Lancel case containing the narcotics.

Francis Gill, a Special Agent of the BNDD, testified that he observed Castiglione surveilling the discussions which Chaminadas had with Adamo in the Sheraton Bar on May 2nd. Again on the 8th of May he observed Castiglione enter the Hotel from the front door and register in room 1525 under his correct name. Gill was posing as a Sheraton room reservations clerk. At approximately Noon on the 9th of May, Gill saw Rizzuto enter the hotel and register in room 1005, using the false name of "Vincenzo Columbo". Rizzuto signed the register as a single occupant, at two minutes past Noon on May 9th, and paid \$25.61 room rent, including tax, by cash in advance.

We have previously mentioned how Castiglione entered

Findings of Fact and Conclusions of Law

19a

the elevator at the 11th floor immediately prior to his arrest, and in company with O'Neill, Pinto, and also Gill, who was already on the elevator, pressed the button for the 10th floor (Rizzuto's floor). Castiglione walked out of the elevator with the suitcase full of heroin and started down the hall in the direction of Rizzuto's room. He was placed under arrest, and the suitcase containing the narcotics was seized. At the same time, Gill went to room 1005, knocked on the door, and when Rizzuto opened it, arrested him. The only logical explanation of Castiglione's presence on the 10th floor is that he was actually directing his steps towards Rizzuto's room. The prior meeting between Rizzuto and Castiglione in Castiglione's room on the 15th floor, had indicated to the witness Gill a basis (probable cause) for arresting Rizzuto.

Special Agent Pavlick of BNDD had observed Castiglione on May 2, 1972 meeting with Chaminadas and in the course of that meeting, operating a BMW automobile. Rizzuto concedes ownership of this vehicle. On the night of May 9th, Pavlick initially saw Castiglione about 10 feet away from the door of Rizzuto's room on the 10th floor and in possession of the satchel in which the money was contained. This warrants an inference that Castiglione,

Findings of Fact and Conclusions of Law

20a

registered on the 15th floor, and having no business whatever on the 10th floor, except in connection with Rizzuto, had been to Rizzuto's room for the purpose of picking up the money. This is consistent with what Castiglione had told Chaminadas with regard to the procedure which he would use in having the money delivered to him, and admissible against Rizzuto on this trial.

Surveillance of the halls in the motel was available in the lobby; closed circuit television had been installed and regularly maintained by Sheraton for the purpose of protecting motel guests against generalized criminal activity. This surveillance permitted an observer to watch each hall in the building selectively at will. At the request of the BNDD, the system had been adjusted to cover the 15th floor constantly and the 10th and 11th floors intermittently. The facility also permitted the making of video-tapes.

Certain of these video-tapes were received in evidence and have been viewed by the Court.

The video-tape shows Rizzuto entering Castiglione's room, 1525, at approximately 1:00 P.M. on May 9th. Rizzuto

Findings of Fact and Conclusions of Law

21a

came out about ten minutes later, and returned to his own room. Rizzuto later returned to Room 1525.

Defendant presented a defense which can only be termed remarkable. His wife testified in his behalf that she had been married since June 4, 1965, and was residing in May, 1972 with her husband, the defendant, and their two minor children in a two family house in Brooklyn, owned by her parents. She paid \$90.00 per month rent, and she and her husband took their meals with her parents in the other half of the house.

Defendant, according to his wife, was and is employed as a presser in a clothing factory, but it was not a steady job. Rather, the employment was both marginal and seasonal. When out of work, defendant subsists on unemployment insurance.

On the morning of May 9th, Mrs. Rizzuto received a telephone call about 8:30 in the morning from Castiglione, who asked for her husband, who was then sleeping. She did not hear the conversation. Mrs. Rizzuto left the house about 9:00 A.M. and her husband left an hour or two later. At that time, Rizzuto was not employed. His seasonal employment began around

Findings of Fact and Conclusions of Law

22a

June of each year, and he had been unemployed between February and May 9, 1972.

Defendant, a native of Italy who speaks little English, testified in his own behalf. He said that he received a call from Castiglione on May 9, 1972 in the morning, and that he had known Castiglione for approximately two years, having met him at a coffee shop. He said he had permitted Castiglione to use his automobile on occasion, without asking where he was going, or for what purpose.

On May 9, 1972, according to Rizzuto, Castiglione "said that I should go to meet him at a certain hotel, that we were going to meet two girls." (Tr. p.147). Rizzuto agreed and received the name of the hotel from Castiglione. He says he left his house around 11:00 o'clock and took his suitcase with him, and that he took his car to go to the Sheraton Inn. He parked in front of the hotel, and registered under the false name of Vincenzo Columbo. He said that he was afraid of giving his real name because he was married. The hotel gave him a room on the 10th floor, although he knew at the time he registered that Castiglione was already in the hotel in Room 1525 on the

Findings of Fact and Conclusions of Law

23a

15th floor. He went to Castiglione's room, and "we were talking about these girls. I must have been there about an hour, hour and a half or so." Castiglione told Rizzuto that the girls were coming a little later, and that he should go back to his room and wait; and he did so. About an hour and a half after his return to his room, placed by him as between 2:00 and 3:00 o'clock, he returned to Castiglione's room because he was tired of waiting, and went up to ask Castiglione again to see what was going on. Again he waited approximately two and a half or three hours in the room.

Castiglione never came to Room 1005 according to Rizzuto. In this regard, Rizzuto's testimony is false; I credit the testimony of Agent Pavlick as truthful and infer therefrom that Castiglione was at Rizzuto's 10th floor room at about 9:10 P.M. when he apparently picked up the bag containing the money, which Castiglione then took to Chaminadas' room, as shown on the videotape.

At 9:00 o'clock, Rizzuto says, Castiglione called and told him to wait another fifteen minutes, at which time Rizzuto said "hurry up, because I am leaving". Twenty minutes to a half

Findings of Fact and Conclusions of Law

24a

hour later there was a knock on the door, and Rizzuto was arrested.

Rizzuto claimed that he was then in the bed, lying down, watching television. Here again he lied; I credit the testimony of O'Neill (Tr. p.34), cited supra, p.6, to the effect that the beds were not unmade.

Rizzuto on cross examination disclaimed that he had ever had a prior assignation arranged through Castiglione. He said that Castiglione in discussions about a week before had offered to get a date for him, and also that this was the first time he had ever made arrangements to meet a girl in a hotel.

Although Rizzuto said that he had never gone to a hotel before for purposes of assignation, he believed that he should have a suitcase "because when you go to a hotel, the person in charge takes the valise upstairs to your room." No one had told him that he had to have baggage to register, and he had never before had to pack a suitcase with paper towels in order to register at a hotel. The witness expressed his view of it as follows: (Tr. p.161) "Well, when you go to a hotel with the intention of meeting a woman, you can't go with an

Findings of Fact and Conclusions of Law

25a

empty suitcase. ... No one informed me of the fact, but its something that I should carry with some weight in it, so that it looks as if there is some clothing inside." He claims that he drove his car three blocks from his house with the empty suitcase, bought the towels, and then went back home to put the towels in the suitcase.

Rizzuto claims he understood that the girls were to be paid for their services, but was uncertain as to who was to pay them. His testimony in this regard was as follows: (Tr. p. 163-64)

"Q. Who was going to pay them?

A. Well, he didn't say that I should pay. Maybe he [Castiglione] was going to pay.

Q. Was this a gift to you by Mr. Castiglione?

A. Well, that I don't know. Maybe when the girls would finally show up, then I would find out. ...

Q. Did you have any idea how much they were going to charge?

A. Who knows these things? Maybe \$25.00, \$30.00. ...

Q. Did Mr. Castiglione give you that money to pay for your hotel room?

A. No."

Findings of Fact and Conclusions of Law

26a

At the time of this supposed escapade, Rizzuto was receiving \$75.00 per week unemployment insurance, and his wife was unemployed. He was paying \$90.00 a month rent, maintaining an automobile and supporting his wife and two children. He had never before gone to a hotel and registered for the purpose of an assignation. He did not know the names of the girls, but contends that the only reason he was at the hotel was to meet these two girls with Castiglione.

The testimony of defendant is incredible, and totally unworthy of belief. As to unimportant, but verifiable details, such as whether the bed was made or unmade, and as to whether Castiglione came to Room 1005, it is at a variance with credible testimony of others. Falsus in uno, falsus in omnibus.

We are faced with the situation of an unemployed man aged 37, living on the edge of poverty with his wife, from whom he was not estranged. He has cash receipts of \$75.00 per week, and three dependents whose sole support is his obligation.

It is utterly incredible that he would come to Manhattan and enter a transient hotel, pay \$25.61 in cash in advance as

Findings of Fact and Conclusions of Law

27a

room rent for an assignation with a girl whom he had not even met, and whose presence was not assured, whose name he did not know, and whose price for debauchery was uncertain.

Not even the most lavish and avid rake would enter into this type of an arrangement. We need not as judges, close our eyes to the sum total of the common sense available to jurors. Our common sense tells us that one in Rizzuto's economic circumstances, by his own testimony, "not desperate for a woman" (Tr. p. 165) does not go about arranging or conducting an assignation in this manner.

Furthermore, it is unbelievable that Castiglione would have arranged for Rizzuto and himself to meet two girls for an assignation at the very same time that he was attempting to close a complicated and difficult narcotics transaction involving \$130,000.00 in cash. The last thing in the world a narcotics dealer positioned as was Castiglione would want to be burdened with during his dealings at the hotel is an amorous coffee house colleague who has paid substantial room rent to enjoy the favors of a girl who then does not appear, or if she does, may turn out to be unsatisfactory or cause a disruption.

Findings of Fact and Conclusions of Law

28a

It is utterly incredible that Castiglione would so risk the dangers usual on combining business with pleasure.

1

Rizzuto's presence in the Sheraton in company with Castiglione and his visits to Castiglione's room requires an alternate explanation. The Court is convinced that actually Rizzuto's presence in the hotel and the substantial investment in time and money made by him on that date, was intended to assist Castiglione in a narcotics transaction, and that Rizzuto acted either as a messenger boy for the money, a guard, a back-up man, or was in attendance for the purpose of assisting in the transportation of the narcotics and the money, or for all of the aforementioned purposes.

The Government has shown a conspiracy existed between Castiglione, Adamo and the Canadians Orsini and Mendolia to deal in heroin, and that overt acts in the Indictment, Nos. 5, 6, 7 and 8, had occurred in the Southern District. With respect to overt act No. 6, the correct date is May 9th, rather than May 8th, and with respect to overt act No. 7, the correct date is May 8th, rather than May 9th. The registration is in the name of Columbo, rather than Consuelo.

Findings of Fact and Conclusions of Law
In order to determine Rizzuto's guilt or innocence

29a

on either count our first task is to inquire into Rizzuto's state of mind for the Supreme Court tells us that "[c]onspiracy to commit a particular offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." Ingram v. United States, 360 U.S. 672, 678 (1959). Section 841 of Title 21 declares it to be unlawful for "any person knowingly or intentionally ... to ... possess with intent to ... distribute [a narcotic drug]." Thus, to find Rizzuto guilty on either count we must be satisfied beyond a reasonable doubt that Rizzuto had the specific intent to be a partner in a scheme to possess with the intent to distribute a narcotic drug.

In addition, with regard to the conspiracy count (Count 1), more is required for a conviction than "knowledge, approval of or acquiescence in the object or the purpose of the conspiracy.... [The defendant] must in some sense promote their venture himself, make it his own, have a stake in its outcome." United States v. Cianchetti, 315 F.2d 584, 588 (2d Cir. 1963). Further, "[K]nowledge that a crime is being committed, even when coupled with presence at the scene, without more ... is generally insufficient to prove

Findings of Fact and Conclusions of Law
[conspiracy]." United States v. Terrell, 474 F.2d 872, 875 (2d Cir. 1973). See United States v. Steward, 451 F.2d 1203, 1207 (2d Cir. 1971).

The Government having proved by evidence other than hearsay declarations, the existence of the conspiracy and the membership therein of Adamo, Orsini, Mendolia and Castiglione, the oral declarations of Castiglione and Adamo may be taken as evidence of Rizzuto's participation in the conspiracy.

As was previously mentioned, p.11, supra, when Castiglione was instructing Chaminadas as to how the exchange would be made, he told Chaminadas, "in the same words that Vito Adamo told [him]", that his friend would rent a room in the Sheraton, and receive the money (Tr. p.66).

The visits of Rizzuto and Castiglione to each other's rooms on May 9th, during the hours preceeding the exchange, confirms to Castiglione's explanation of how he would receive the money and warrants an inference that Rizzuto was, in some way, assisting Castiglione. ' / '

Aside from Chaminadas, Rizzuto was the only person to

Findings of Fact and Conclusions of Law

31a

visit Castiglione's room on May 9th. Of particular significance is the fact that on May 9th at approximately 9:10 P.M., Special Agent Pavlick observed Castiglione on the 10th floor, about ten feet from Rizzuto's room, walking away from the room and towards the elevator, carrying a small black attache case. He carried this case directly into Chaminadas' room, where he opened it and showed Chaminadas that it contained \$122,000.00.

Notwithstanding Rizzuto's own incredible explanation of his activities on May 9th, it might be possible to construct a reasonable, yet wholly innocent story to explain Rizzuto's apparent actions in concert with a narcotics wholesaler. However, in sitting as a juror, we should not rule out common sense, nor consider evidence entirely out of context. "[P]ieces of evidence must be viewed not in isolation, but in conjunction." United States v. Geaney, 417 F.2d 1116, 1121 (2d Cir. 1969).

Based on the entire record, I find beyond a reasonable doubt that Rizzuto knew that a narcotics transaction was being conducted in the Sheraton on May 9th, and that by his presence at the scene of the crime, and by his actions, Rizzuto lent his support to the object of the conspiracy and established his stake

Findings of Fact and Conclusions of Law
 in the outcome. "[H]e participate[d] in it as in something that he wishes to bring about, that he [sought] by his action to make it succeed." United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938); see United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962); cf. United States v. LaFroscia, 485 F.2d 457 (2d Cir. 1973); United States v. Beltram, 338 F.2d 449 (2d Cir. 1968). See also, United States v. Masullo, F.2d ____ (2d Cir. 1973).

I also find beyond a reasonable doubt that Castiglione committed the substantive crime charged in Count 2 in furtherance of the conspiracy. He was arrested on the 10th floor of the Sheraton with 13 kilos of heroin in his possession. Since the acts of one co-conspirator in furtherance of the conspiracy may be attributed to his confederates while they remain members of the conspiracy. I also find beyond a reasonable doubt Rizzuto guilty on Count 2. Pinkerton v. United States, 328 U.S. 640, 645-48 (1946); United States v. Castellana, 349 F.2d 264, 278 (2d Cir. 1965), cert. denied, 383 U.S. 928 (1966).

The foregoing constitutes findings of fact and conclusions of law pursuant to Rule 32, F.R.Crim.P.

Dated: New York, New York
 March 19, 1974

CHARLES L. BRIEANT, JR.

CHARLES L. BRIEANT, JR.
 U. S. D. J.

U.S. COURT OF APPEALS: SOUTHERN DISTRICT

U.S.A.,

Appellee,

against

RIZZUTO,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James Steele; being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

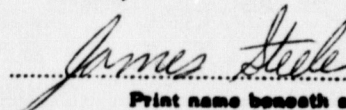
250 West 146th Street, New York, New York
That on the 21st day of June 1974 at Foley Sq., New York

deponent served the annexed Appellant's Brief upon

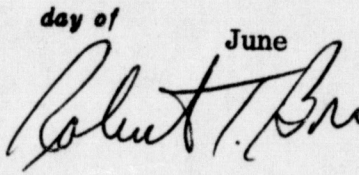
Paul J. Curran-U.S. Attorney Southern Dist. -Attorney for Appellee

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 21st
day of June


Print name beneath signature

JAMES STEELE


ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

